UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RENALDO WHITE, RANDOLPH NADEAU, individually and on behalf of all others similarly situated, Plaintiffs, v. SYMETRA ASSIGNED BENEFITS SERVICE COMPANY and SYMETRA LIFE INSURANCE COMPANY, Defendants.	CASE NO. C20-1866 MJP ORDER DENYING MOTION TO DISMISS AND STRIKE CLASS ALLEGATIONS

This matter is before the Court on Defendants' motion to dismiss and strike class allegations. Having fully considered the Parties' briefing (Dkt. Nos. 31, 32, 34, 40) and positions at oral argument, (Dkt. No. 43), the Court DENIES the motion.

Background

This is a proposed class action by plaintiffs who resolved personal-injury claims through structured settlements which included immediate lump-sum payments and future periodic

payments. They sold their rights to future payments in exchange for immediate lump-sum payments worth significantly less. (Dkt. No. 28 ("Amended Complaint").) Defendants are Symetra Life Insurance Company (Symetra) and its affiliate, Symetra Assigned Benefits Service Company (SABSCO).

After Plaintiffs settled their personal-injury lawsuits, the defendants assigned their obligations to make periodic payments to SABSCO, which received a cash payment from the defendant or their liability insurer. (Id. at ¶ 54.) SABSCO purchased a structured settlement annuity (SSA) from its affiliate Symetra to fund and administer the future payments. (Id.) Later on, Plaintiffs sold their rights to future payments to SABSCO in exchange for immediate lump-sum payments, at a significant discount. That required state-court approval in Plaintiffs' home states of New York and Tennessee. (Id. at ¶¶ 89–102.)

Plaintiffs now allege that Defendants' solicitation of their rights to future payments was predatory, for several reasons. It depended on SABSCO's access to confidential information Plaintiffs provided to Symetra for the purpose of pricing and administering their annuity payments. (Id. at ¶¶ 71–77.) Defendants did not disclose conflicts of interests—in particular, the profits they would gain by avoiding future payments pursuant to the underlying settlement agreements. Plaintiffs also claim Defendants sent misleading solicitations and intentionally evaded anti-assignment language in the settlements that prohibited the very transfers at issue here. (Id. at ¶¶ 71–88.)

A. Facts Relating to Named Plaintiffs

When Renaldo White was ten years old, he was hit while riding a bike. (Id. at ¶ 89.) In the settlement of his personal-injury lawsuit, the defendants paid a lump sum up front and agreed to make a series of periodic payments throughout Mr. White's lifetime. (Id. at 90–91.) Mr.

White became an annuitant and payee of an SSA, which was purchased by SABSCO and issued by Symetra (then Safeco). (Id. at ¶ 91.)

The settlement included what Plaintiffs call "power language," which denied Mr. White the right to sell or assign his payment rights. The relevant provision states:

> The Claimant . . . shall have no rights of control over the period payments. The Claimant shall not be able to ACCELERATE, DEFER, INCREASE OR DECREASE the periodic payments and shall not have the power to sell, mortgage, anticipate or encumber these payments, or any part thereof, by assignment or otherwise. No part of the above periodic payments or any assets of the Insurer are to be subject to execution or any legal process for any obligation of the Claimant.

(Id. at ¶ 80.) Plaintiffs argue the provision is a bargained-for safeguard to protect the settlements of vulnerable tort victims. The benefits of such language are clear: if the annuitant has no authority to access or transfer the payments, the settlement is safe from creditors. It also prevents annuitants from unwisely spending settlement proceeds.

Nevertheless, in 2011, Mr. White signed an agreement with SABSCO to sell:

> (i) 149 life contingent monthly payments of $300 from February 1, 2018 through and including June 1, 2030, and
>
> (ii) each and every future life contingent monthly payment in the amount of $1,750 owed to him from July 1, 2030 until his death.
>
> The "effective annual interest rate" for this transaction was 15.03% per year. Plaintiff White received just $18,609 from SABSCO as consideration for this factoring transaction.

(Id. at ¶ 92.)

Mr. White was 31 when he sold these payment rights. His life expectancy is 81 years. If he lived that long, Symetra would have been required to pay him $695,000. (Id. at ¶ 93.)

Randolph Nadeau's personal-injury settlement also resulted in a settlement of a lump-sum payment as well as periodic lifetime payments, including "$430 per month for thirty years

certain commencing on December 27, 1995 and continuing to and including November 27, 2025; and $1,297.33 paid monthly for life commencing December 27, 2025." (Id. at ¶ 98.)

Mr. Nadeau's settlement contained similar "power language":

> Said payments cannot be accelerated, deferred, increased or decreased by the Plaintiff and no part of the payments called for herein or any asserts of the Defendant are to be subject to execution or any legal process for any obligations in any manner, nor shall the Plaintiff have the power to sell or mortgage or encumber same, or any part thereof, nor anticipate the same, or any part thereof, by assignment or otherwise.

(Id. at ¶ 81.) But Mr. Nadeau also sold his payment rights to SABSCO, on multiple occasions:

> SABSCO purchased Plaintiff Nadeau's periodic payments from him on four occasions. In 2006, SABSCO purchased 75 guaranteed monthly payments of $430.00 each, commencing on October 27, 2006 through and including December 27, 2012. In 2011, SABSCO purchased 48 guaranteed monthly payments of $430.00 each, commencing on January 27, 2013 through and including December 27, 2016. In 2017, SABSCO purchased 72 guaranteed monthly payments of $430.00 each, commencing on July 27, 2017 through and including June 27, 2023. In 2020, SABSCO purchased 29 guaranteed monthly payments of $430.00 each, commencing on July 27, 2023, through and including November 27, 2025, and 36 life-contingent payments, each in the amount of $1,297.33 commencing on December 27, 2025, through and including November 27, 2028.
>
> In this last transaction in 2020, Plaintiff Nadeau was divested of $59,173.88 of future periodic payments. In exchange he received just $20,091.58, which is the equivalent of borrowing the $59,173.88 at 18.00% interest.

(Id. at ¶¶ 99–100.)

Discussion

I. Motion to Dismiss

Defendants move to dismiss under FRCP 12(b)(1) and 12(b)(6) based on the following arguments. (Dkt. No. 31.) First, the Court lacks subject-matter jurisdiction because there is no federal district court review of state-court decisions under 28 U.S.C. § 1257. Second, judicial estoppel bars Plaintiffs claims because they are incompatible with the positions they maintained in the state-court proceedings. They ask the Court to consider state-court records, either because they have been incorporated into the amended complaint by reference or on judicial notice.

Third, Defendants argue that Plaintiffs have failed to allege an injury—an element common to all their claims—because they would owe Defendants money if the transactions were unwound. Fourth, Plaintiffs' claims are time-barred. And fifth, Plaintiffs fail to plead the necessary elements of various claims.

A. Whether the Court Lacks Subject-Matter Jurisdiction under Rooker-Feldman

Defendants argue that the Court lacks subject-matter jurisdiction under the Rooker-Feldman doctrine. The Rooker-Feldman doctrine applies to the "limited circumstances in which [the Supreme Court's] appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority . . . ." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005). It is "confined to . . . cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Id. at 284.

Under Defendants' theory, Plaintiffs are state-court losers because they gave up rights to future payments in those proceedings. They are alleging injuries caused by state-court judgments which were rendered before this proceeding because the transactions in which they sold their payment rights required state-court approval. And Plaintiffs are inviting this Court to review state-court judgments because any path to liability requires this Court to find the state courts misapplied state law and set aside the state-court judgments.

It is somewhat awkward for Defendants to argue that Plaintiffs are "state-court losers" when they defend the very same proceedings for finding the transactions were fair and reasonable and in Plaintiffs' best interest. In turn, their argument on judicial estoppel also

depends on the premise that Plaintiffs "succeeded" in state court. Ultimately, the analogy does not quite fit, which is an early indication that applying Rooker-Feldman is inappropriate here. In fact, the state-court proceedings were not adversarial, so it is difficult to conclude there was a "state-court loser" at all. While Co-Defendant SABSCO filed petitions asking for the transfers to be approved, Plaintiffs had already signed purchase-and-sale agreements with SABSCO and submitted affidavits in support of the transaction. No issues were actually litigated, and certainly not the claims here. Rather, the state courts made certain findings—e.g., that the transfers were in Plaintiffs' best interests—and approved the proposed transfers. This is not a situation where, for example, Plaintiffs had argued in state court that the transfers were not in their best interests, lost that argument in a contested ruling, and then filed suit asking this Court to make a contrary finding.

At oral argument, Defendants argued that some courts have applied Rooker-Feldman even when the underlying state-court proceedings were not adversarial. See Dockery v. Heretick, 2019 WL 2122988, at *8 (E.D. Pa. May 14, 2019) (collecting cases). But Defendants ask the Court to interpret these cases with a broad brush that obscures adversarial elements beneath the surface. In Johnson v. Orr, cited in Dockery, the party against whom the court applied Rooker-Feldman filed a federal-court civil rights action after a state court had denied his petition to compel the county to issue him a tax deed, relief that was foreclosed by a consent order he had entered into with the county after adversarial proceedings. 551 F.3d 564, 566–68 (7th Cir. 2008). The Dockery court also cites Crawford v. Adair, as an example involving a nonadversarial "consent order"—but the consent order was a settlement of an adversarial state-court action. 2008 WL 2952488, at *2 (E.D. Va. July 29, 2008).

The situation at hand is closer to one the Second Circuit recently considered. In Cho v. City of New York, the Second Circuit held Rooker-Feldman did not apply to a lawsuit "alleging harm flowing from wrongful conduct leading to settlement terms" because the plaintiffs did not "argue that the state courts committed any error in so-ordering the parties' agreements." 910 F.3d 639, 647 (2d Cir. 2018). While the courts here did more than so-order a settlement, they did far less than adjudicate claims in an adversarial proceeding.

The Supreme Court has emphasized that the Rooker-Feldman doctrine occupies narrow ground. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 280–81 (2005). As has the Ninth Circuit. Carmona v. Carmona, 603 F.3d 1041, 1050 (9th Cir. 2010) ("In practice, the Rooker-Feldman doctrine is a fairly narrow preclusion doctrine, separate and distinct from res judicata and collateral estoppel."). Defendants have not given sufficient justification to expand it into new territory.

More decisive is the fact that Plaintiffs do not allege their injuries were caused by the state-court judgments. They do not claim the state courts' findings that the transactions were in their best interest is what caused them harm. They claim Defendants caused them harm—by misusing their confidential information, failing to disclose conflicts of interest, breaching fiduciary duties, and engaging in other unfair or deceptive conduct which induced Plaintiffs to sell their payment rights for far less than they were worth, even though they had no authority to sell their payment rights at all. This process may have ended with state-court approval. But, according to the allegations, Defendants' conduct was the cause of their injuries, not the state-court judgments. See Sykes v. Mel S. Harris & Assocs. LLC, 780 F.3d 70, 94–95 (2d Cir. 2015) ("claims sounding under the [Fair Debt Collection Practices Act], [the Racketeer Influenced &

Corrupt Organization Act], and state law speak not to the propriety of the state court judgments, but to the fraudulent course of conduct that defendants pursued in obtaining such judgments.").

Finally, Plaintiffs are not asking this Court to "review and reject" the state-court judgments. Plaintiffs here seek damages for the harms and statutory violations alleged, not an order invalidating the state-court proceedings. See Cordero v. Transamerica Annuity Serv. Corp., 452 F. Supp. 3d 1292, 1300 (S.D. Fla. 2020) (claim not barred by Rooker-Feldman because it "plausibly challenges [annuity issuer's] course of conduct related to the approval of the transfers, which [plaintiff] alleges amounts to fraud. [Plaintiff] does not challenge the propriety of the state court final orders that authorized them.").

In sum, Rooker-Feldman does not apply to this proceeding because Plaintiffs are not state-court losers, they raise claims independent of the state-court proceedings, and they do not ask the Court to review and reject the state-court judgments. To the extent the state-court proceedings pose barriers to Plaintiffs' claims, those issues are not jurisdictional. Rooker-Feldman does not prevent a

> district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff presents some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.

Exxon Mobile Corp., 544 U.S. at 293 (cleaned up).

B. Whether Plaintiffs' Claims Are Barred by Judicial Estoppel

Defendants argue Plaintiffs' claims are barred by judicial estoppel, which "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." New Hampshire v. Maine, 532 U.S. 742, 749 (2001). The purpose of equitable estoppel is to "protect the integrity of the judicial process," and it is "invoked by a court at its discretion." Id. at 749–50.

This argument depends on another issue, which is whether the Court should consider state-court records Defendants submit in support of their motion. (See Dkt. No. 32, Declaration of Medora A. Marisseau ("Marisseau Decl.").) Defendants ask the Court to do so either because the Amended Complaint has incorporated the records by reference or on judicial notice.

1. Whether the Court should consider the state-court records.

A motion to dismiss under FRCP 12(b)(6) is generally limited to the pleadings. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). In deciding whether a complaint states a plausible claim for relief, the Court starts with "the facts plausibly alleged in the complaint, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." In re Alphabet, Inc. Sec. Litig., 1 F.4th 687 (9th Cir. 2021).

Incorporation by reference and judicial notice have a role to play at the pleadings stage. But the Ninth Circuit recently cautioned that their improper application can result in premature dismissals of valid claims:

> The overuse and improper application of judicial notice and the incorporation-by-reference doctrine, however, can lead to unintended and harmful results. Defendants face an alluring temptation to pile on numerous documents to their motions to dismiss to undermine the complaint, and hopefully dismiss the case at an early stage. Yet the unscrupulous use of extrinsic documents to resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery.

Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 988 (9th Cir. 2018).

There is also a notable difference between considering a document to be incorporated into the complaint by reference and taking judicial notice of facts contained in a document. A document that is incorporated into the complaint by reference is assumed to be true for the purposes of a motion to dismiss. On the other hand, any facts that are noticed are viewed in the light most favorable to Plaintiffs.

a. Incorporation by reference.

Defendants argue the Amended Complaint incorporates state-court records by reference because it suggests the proceedings involved unfair or deceptive practices by Defendants, were one-sided in that Plaintiffs lacked legal counsel, and did not comply with state laws regarding mandatory disclosures. (Dkt. No. 31 at 20.) Put simply, this is not what the doctrine of incorporation by reference entails.

Incorporation by reference "is a judicially created doctrine that treats certain documents as though they are part of the complaint itself," the purpose of which is to prevent plaintiffs "from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims." Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1002 (9th Cir. 2018). "However, if the document merely creates a defense to the well-pled allegations in the complaint, then that document did not necessarily form the basis of the complaint. Otherwise, defendants could use the doctrine to insert their own version of events into the complaint to defeat otherwise cognizable claims." Id.

The Amended Complaint does not reference a single specific state-court record. In over sixty pages, it makes only limited factual allegations about the state-court proceedings with respect to the two Plaintiffs, such as that SABSCO's counsel drafted and submitted the documents to the state courts. (See Am. Compl. at ¶¶ 94, 101, 169.) All other references to the court-approval process are generic and intended to describe facts necessary to understand the regulatory structure at play. (See id. at ¶¶ 14, 56, 62, 85, 160.)

Plaintiffs claims do not rest on the factual allegation that the documents in the state-court proceedings were drafted by and submitted to the court by an attorney for one of the Defendants, and Defendants do not seek to introduce the court records for the purpose of refuting that

allegation. Rather, the state-court records are merely a way of disputing factual allegations in the Amended Complaint and creating defenses to Plaintiffs' claims. See Khoja, 899 F.3d at 1002. Defendants' argument on this point is nowhere close to the "rare instances when assessing the sufficiency of a claim requires that the document at issue be reviewed, even at the pleading stage." See id. at 1002. In any case, "the mere mention of the existence of a document is insufficient to incorporate the contents of a document." Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010). Compare Knievel v. ESPN, 393 F.3d 1068 (9th Cir. 2005) (document referenced in complaint was necessary to determining whether statement at issue was "capable of sustaining a defamatory meaning," an element of the defamation claim). For all of these reasons, the Court finds the state-court records are not incorporated by reference into the Amended Complaint.

b. Judicial notice.

Alternatively, Defendants ask the Court to take judicial notice of the state-court records. "Judicial notice under [Federal Rule of Evidence] 201 permits a court to take notice of an adjudicative fact, if it is "not subject to reasonable dispute." Khoja, 899 F.3d at 1002. "But a court cannot take judicial notice of disputed facts contained in such public records." Id. (citing Lee v. City of L.A., 250 F.3d 668, 689 (9th Cir. 2001)). Whether a document is authentic is only part of the Court's inquiry under FRE 201. "A court must also consider—and identify—which fact or facts it is noticing . . . . Just because the document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." Id. at 999.

Plaintiffs do not dispute the authenticity of the records. (Dkt. No. 34 at 22). In reply, Defendants clarify that they are not offering the state-court records for the truth of the facts they

contain but for the fact that the statements were made, which Defendants argue should lead to the application of judicial estoppel. (Dkt. No. 40 at 14.) At oral argument, counsel for Defendants identified specific facts the Court should notice for the purpose of applying judicial estoppel. These include the following.

With respect to Plaintiff Nadeau:

- That an order and judgment was entered in New York state court approving a structured settlement transfer on March 13, 2020. (Marisseau Decl., Ex. A.)
- That the court found the transfer complied with applicable law, (id. at ¶ 1); the transfer was in the best interest of Mr. Nadeau, (id. at ¶ 2); the financial terms were fair and reasonable, (id. at ¶ 3); that Mr. Nadeau was advised in writing to seek independent professional advice but declined to do so, (id. at ¶ 4); and that there were no written objections to the transfer from interested parties, including the annuity issuer, (id. at ¶ 7.).
- That an affidavit signed by Mr. Nadeau was annexed to SABSCO's petition seeking court approval of the transfer. (Id., Ex. B at 38.)
- That Mr. Nadeau stated in the affidavit that he believed the transfer was in his best interest. (Id. at 40.)
- That the court's approval involved a hearing which included Mr. Nadeau's testimony, (id., Ex. F); and that Mr. Nadeau testified that he declined counsel, (id. at 9–10); and had specific financial needs for the lump-sum payment he would receive in the transaction, (id. at 11–15).

With respect to Plaintiff White:

- An order and judgment was entered in Tennessee state court approving a structured settlement transfer on July 28, 2011. (Id., Ex. C.)
- That the court found the transfer complied with applicable law, (id. at ¶ 1); the transfer was in the best interest of Mr. White, (id. at ¶ 2); the financial terms were fair and reasonable, (id. at ¶ 2); that Mr. White was advised in writing to seek independent professional advice but declined to do so, (id. at ¶ 3); and that there were no written objections to the transfer from interested parties, including the annuity issuer, (id. at ¶ 6.).
- An affidavit signed by Mr. White was annexed to SABSCO's petition seeking court approval of the transfer. (Id., Ex. D at 19.)

- That Mr. White stated in the affidavit that he believed the transfer was in his best interest. (Id. at 20.)

Because Plaintiffs do not dispute the authenticity of the state-court records, the Court has discretion and will consider the above facts on judicial notice.

2. Whether judicial estoppel applies.

Defendants argue that judicial estoppel bars Plaintiffs' claims because their positions here are incompatible with positions they took in the prior state-court proceedings. While not reducible to a general formula, there are several factors which typically inform whether to apply judicial estoppel:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001) (cleaned up). These factors are not "inflexible prerequisites or an exhaustive formula. Additional considerations may inform the doctrine's application in specific factual contexts." Id. at 751. The Ninth Circuit has identified "chicanery or knowing misrepresentation by the party to be estopped [as one such] factor to be considered in the judicial estoppel analysis." Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 995 (9th Cir. 2012).

The Supreme Court recognized that judicial estoppel will not necessarily apply if a party provides a "good explanation" for their change in position. New Hampshire v. Maine, 532 U.S. 742, 749 (2001). After reviewing the facts to be noticed in the state-court records and considering the arguments of both sides, it is clear that judicial estoppel is not appropriate here,

particularly under the standard governing a motion to dismiss. To the extent their representations to the state courts constitute "positions" taken in prior proceedings, they are not "clearly inconsistent" with Plaintiffs' positions in this proceeding, and any inconsistencies do not raise the kinds of concerns judicial estoppel is designed to address. Plaintiffs' argument, in short, is that Defendants misled or fraudulently induced them into selling their rights to future payments for lump sums worth much less in proceedings in which they had no legal representation, even though bargained-for provisions of their original settlement agreements forbid them from entering into any such transaction. Plaintiffs' subjective belief that the transactions were in their best interest at the time, because they had immediate financial needs, is not a barrier to their claims because, they argue, that belief was induced by Defendants' conduct. See e.g., Lawson v. Lawson, 2014 WL 6389441, at *4 (D. Nev. Nov. 14, 2014) (no judicial estoppel where party pleaded inconsistent position was result of fraud, inadvertence, or mistake). Construing the facts in favor of Plaintiffs—and taking note that Plaintiffs were unrepresented and that Mr. Nadeau's affidavit states it was prepared by SABSCO's attorneys—their positions here and their representations to the state courts are not "clearly inconsistent," or "so inconsistent that they amount to an affront to the court." See Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, 692 F.3d 983, 995 (9th Cir. 2012). Any inconsistencies are reconcilable or explained by their factual allegations in support of the theory of their case and the claims they have raised. See New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (a "good explanation" may preclude application of judicial estoppel).

There is also no indication of "unfair advantage" in favor of Plaintiffs. Plaintiffs' statements that the transactions were in their best interest must be viewed in context. Defendants state it was Plaintiffs who "sought and obtained state-court approval" to transfer their payment

rights to SABSCO. (Dkt. No. 31 at 7.) That is not accurate. SABSCO petitioned for court approval of the transactions. (Marisseau Decl., Exs. B (Mr. Nadeau) & D (Mr. White).) In addition, the signed purchase-and-sale agreements in which Plaintiffs sold their rights to SABSCO were annexed as exhibits to the petitions. (Id., Ex. B at 19–21, Ex. D at 7–10.) The deal was already done. The records do not show it was Plaintiffs who sought out court approval.

But the most important fact regarding unfair advantage relates to what SABSCO's attorneys omitted from their petitions to the state courts. In both petitions, the purchase-and-sale agreements include a provision in which Plaintiffs warrant that they have the power and right to enter into the agreement to sell their payment rights. (Id., Ex. B at 19, Ex. D at 8.) The petition for approval of the sale of Mr. Nadeau's payment rights also includes a copy of the underlying settlement agreement, which includes "power language" prohibiting him from selling his future-payment rights. (Id., Ex. B at 12.) Although the settlement denies Mr. Nadeau any right to accelerate or sell his payments, the purchase-and-sale agreement contains a provision in which he warrants exactly the opposite. Of course, the purpose of such a provision is to protect the rights of the purchaser in a transaction, which in this case is SABSCO.

In addition, even though the settlement is included with the petition, SABSCO not only omitted any mention of the power language but went a step further to ensure the court's order would not be affected by it. SABSCO's proposed order, annexed to the petition, includes the following provision:

> This Order is entered without prejudice to the rights of Symetra Life Insurance Company and/or Symetra Assigned Benefits Service Company, and the Court makes no finding regarding the enforceability of any non-assignment provisions contained in the original settlement agreement or related documents.

(Id., Ex. B at 68.) That provision is in the court's final order as well. (Id., Ex. A at 5.) The petition seeking court approval of the sale of Mr. White's payment rights did not even include

the original settlement. (Id., Ex. D.) This is despite the fact that his settlement contained similar power language prohibiting him from selling his payment rights. (Am. Compl. at ¶ 80.) Meanwhile, the order approving the transaction involving Mr. White also contained the same provision making no finding regarding the enforceability of any anti-assignment provision in the underlying settlement. (Marisseau Decl., Ex. C at 4.) These are material omissions that support Plaintiffs' allegations that Defendants misled them into entering into these transactions, which were later approved by state courts. They also support Plaintiffs' argument that their claims are based on acts that preceded state-court approval and that Defendants conduct was intentionally deceptive, in light of Defendants' attempts to enforce such anti-assignment language in other proceedings. See e.g., In re Rapid Sellements Ltd's Application for Approval of Structured Settlement Payment Rights, 133 Wn. App. 350, 367 (2006) ("Symetra contends various contractual anti-assignment provisions render the transfers ineffective"); Rapid Settlements, Ltd. v. Symetra Life Ins. Co., 2007 WL 1576437, at *4 (Cal. Ct. App. June 1, 2007) (same); In re Foreman, 850 N.E.2d 387, 390 (2006) (same). Applying equitable estoppel against Plaintiffs is unsupported by the facts before the Court under the standard for a motion to dismiss and would be wholly unjustified given the nature of Plaintiffs' claims and the character of the state-court proceedings.

C. Failure to State a Claim

Defendants raise two objections common to Plaintiffs' claims: that Plaintiffs fail to allege an injury and that most of the claims are time-barred. They also contest specific elements of individual claims.

1. Whether Plaintiffs have alleged an injury

Defendants argue Plaintiffs have failed to allege an injury because they willingly sold their payment rights in exchange for lump sums for which they had individual need. They argue that Plaintiffs would owe them money if the transactions were reversed.

This argument obscures what Plaintiffs sold: reliable streams of income they had no right to give up and which were worth far more than the lump-sum payments they received. They had a property interest in their future payments, and that interest was diminished, Plaintiffs allege, as a result of Defendants' conduct. It does not necessarily matter that the transfers were approved by state courts if Plaintiffs were, as they claim, fraudulently induced to enter into the agreements that were then approved. Therefore, Plaintiffs have alleged an injury.

2. Whether Plaintiffs' claims are time-barred

Defendants argue most of Plaintiffs' claims are time-barred because they are subject to three-, four-, or six-year statutes of limitations running from the date on which their injuries occurred. (Dkt. No. 31 at 24–25.) The complaint was filed on December 30, 2020. (Dkt. No. 1.) However, Plaintiffs have pleaded equitable tolling. (Am. Compl. at ¶ 114–119.)

"Generally, the applicability of equitable tolling depends on matters outside the pleadings, so it is rarely appropriate to grant a Rule 12(b)(6) motion to dismiss (where review is limited to the complaint) if equitable tolling is at issue." Huynh v. Chase Manhattan Bank, 465 F.3d 992, 1003–04 (9th Cir. 2006). Nevertheless, Plaintiffs bear the burden of pleading facts which would give rise to tolling. Hinton v. Pac. Enterprises, 5 F.3d 391, 395 (9th Cir. 1993). Given the nature of Plaintiffs' claims—that Defendants made misrepresentations and material omissions to conceal their conflict of interest and the true nature of the transactions—the statutes of limitations would not begin to toll until they knew or had reason to know of the alleged

wrongdoing. Because there are insufficient facts to determine that issue, it would be inappropriate to bar Plaintiffs' claims on this basis at this stage.

3. *Claim-specific objections*

a. Civil RICO

To recover on a civil RICO claim under 18 U.S.C. § 1962(c), a plaintiff must prove (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity (known as "predicate acts"), (5) causing injury to the plaintiff's "business or property" by the conduct constituting the violation. See Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005). A plaintiff must prove the defendant's unlawful conduct was the proximate cause of their injury. Harmoni International Spice, Inc. v. Hume, 914 F.3d 648, 651 (9th Cir. 2019).

Elements four and five are at issue here. Defendants argue Plaintiffs' civil RICO claim fails because Plaintiffs' allegations of mail and wire fraud (predicate acts, under element four) do not include facts sufficient to find an intent to defraud or deceive. They also argue Plaintiffs lack "RICO standing" because they have not adequately alleged an injury and because any conceivable injury was not proximately caused by Defendants (element five).

Alleging a violation of mail fraud requires showing: "(1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." Miller v. Yokohama Tire Corp., 358 F.3d 616, 620 (9th Cir. 2004). The intent to defraud is "the specific intent to deceive, ordinarily for the purpose of either causing some financial loss to another or bringing about some financial gain to one's self." United States v. Lewis, 67 F.3d 225, 233 (9th Cir. 1995). But state of mind may be alleged

generally in pleadings. Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); Odom v. Microsoft Corp., 486 F.3d 541, 554 (9th Cir. 2007) (state of mind for claim of fraud).

Plaintiffs have pleaded the requisite facts under FRCP 9(b). Plaintiffs allege Defendants sent false or misleading statements to deceive prospective class members into giving up their rights to future payments in exchange for substantially lower lump sums. (See Am. Compl. at ¶¶ 152–59.) According to the Amended Complaint, the purpose of the solicitations was not just for Defendants to offload their own financial risk and increase profits; it was to do that by inducing prospective class members to give up their rights to future payments for much less than they were worth.

Plaintiffs include a copy of one such solicitation. (Am. Compl. at ¶ 75.) They also quote a Symetra website FAQ, which they allege is representative of the solicitations. (Id. at ¶ 71 n. 23, 24.) The website states, in response to why someone would sell their rights to future payments: "You may need to access your settlement money sooner than payments are scheduled to arrive." (Id. at ¶ 74 n. 24.) The FAQ does not mention that someone selling their payment rights will be giving up significant value of those rights; the process is framed as just a way to access settlement money more quickly. And it certainly does not mention that some annuitants have no authority to sell their payment rights under their original settlement agreements because of anti-assignment provisions.

The first part of this question—whether there was an injury sufficient for RICO—does not have to be complicated. Plaintiffs must allege they have suffered a "concrete financial loss" and that a specific business or property interest was harmed. Canyon Cty. v. Syngenta Seeds,

Inc., 519 F.3d 969, 975 (9th Cir. 2008). Defendants do not dispute that the value of the lump sums Plaintiffs received is less than the value of the payments to which they had rights. Losing the value of those rights satisfies the "concrete financial loss" requirement.

Defendants return to their argument that there is no injury because both Plaintiffs would owe them money if their decisions to sell their payment rights were reversed. This argument elides the fact that Plaintiffs gave up a clear property interest—their rights to future payments under the underlying settlement agreements. Some rights were guaranteed and others were life-contingent. While it is true the sums were not determined, the rights themselves were not speculative, and giving them up for less than they are worth is a concrete financial loss.

Regarding proximate cause, Plaintiffs allege they would not have sold their payment rights if they had known of Defendants' conflicts of interest and had been properly advised by financial or legal counsel such that they could see through Defendants' deceptive buyout offers. At this stage, assuming the truth of those facts, Plaintiffs have alleged proximate cause.

b. Washington Consumer Protection Act

The five elements of a CPA claim are:

> (1) an unfair or deceptive act or practice, (2) that occurs in trade or commerce, (3) a public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act and the injury suffered.

Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., 162 Wash. 2d 59, 73 (2007). Unlike RICO, there is no requirement that a defendant intend to deceive. "An unfair or deceptive act or practice . . . need only have the capacity to deceive a substantial portion of the public. A knowing failure to reveal something of material importance is deceptive within the CPA." Deegan v. Windermere Real Est./Ctr.-Isle, Inc., 197 Wn. App. 875, 885 (2017) (cleaned up).

The dispute here is over whether Plaintiffs have properly alleged elements one (unfair or deceptive act or practice) and four (injury). With respect to element one, Plaintiffs allege Defendants had a fatal and nonwaivable conflict of interest; Defendants failed to disclose, and actively concealed, their competing economic interest to class members; Defendants profited at the expense of Plaintiffs and class members; that the transfers were not in Plaintiffs' interest; that Plaintiffs could have received higher payouts from known competitors; and that SABSCO circumvented the structured settlement protection by systematically soliciting waivers of professional advice from Plaintiffs and class members. (Am. Compl. at 174–75.)

Even the few examples included in the complaint and discussed with respect to civil RICO would satisfy the first element as defined by the Washington Court of Appeals in Deegan because they omit matters of "material importance." They describe the transactions as ways to access settlement funds more quickly, leaving out the steep cost that access will come with, as well as the fact that many annuitants have no authority to access funds or transfer rights in this way under their settlements due to "power language." Regarding injury, the analysis under civil RICO applies as well: Plaintiffs gave up payment rights in exchange for a substantially reduced lump sum. The fact that they would owe Defendants money today if the transactions were unwound is irrelevant; losing value of future payment rights is a sufficient injury.

c. Contract-based claims.

Plaintiffs' contract-based claims relate to the anti-assignment provisions in settlement agreements, including "power language." Plaintiffs argue that SABSCO stepped into the shoes of the original defendant or responsible party when it assumed the duty to make payments under the annuity issued in connection with the settlement agreement.

Defendants' contention that Plaintiffs have not identified any specific contractual provision that they violated is unpersuasive. Plaintiffs excerpted the "power language"

provisions from Mr. White and Mr. Nadeau's settlements. (Am. Compl. at ¶¶ 80–81.) In addition, they allege the existence of similar agreements that would make a subclass. These are sufficiently specific allegations.

Defendants also argue that the anti-assignment language bound only Plaintiffs and proposed class members, not them. This issue requires some clarification. The underlying personal-injury lawsuits of course resulted in settlements between plaintiffs and defendants, under which defendants agreed to pay lump sums and periodic payments. Defendants in turn entered into "qualified assignment" agreements with SABSCO in which they assigned their obligations to make the ongoing payments to SABSCO. (Am. Compl. at ¶¶ 53–54.) The settlements also permitted SABSCO to then purchase an annuity to fund the payments. (See Marisseau Decl., Ex. B at 12.)

Plaintiffs allege the qualified assignment agreements contain anti-assignment language that is required under Section 130(c) of the Internal Revenue Code. Under that provision, the money the original defendant paid to SABSCO in exchange for taking on the payment obligation is excluded from gross income only if anti-assignment language protects the ongoing payments. 26 U.S.C. § 130(c). Plaintiffs argue they were intended beneficiaries of the anti-assignment language contained in the qualified-assignment agreements between the original defendants and SABSCO. For these reasons, Plaintiffs have adequately stated their contract-related claims.

d. Breach of fiduciary duty claims.

Defendants argue Plaintiffs have not alleged facts sufficient to conclude that a fiduciary relationship exists for either of Plaintiffs' claims for breach of fiduciary duty. A fiduciary duty may arise because of the nature of the relationship, e.g., trustee and beneficiary, but it "can also arise in fact regardless of the relationship in law between the parties." Liebergesell v. Evans, 93

Wash. 2d 881, 890 (1980). A fiduciary relationship is one "in which one party occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for." Id. at 889–90.

Plaintiffs allege the existence of a fiduciary relationship in fact: Symetra formed a fiduciary duty with class members when it issued an SSA to fund periodic payments arising out of the settlements. (Am. Compl. at ¶¶ 188–96.) The annuity had one purpose, which was to fund the long-term payments of class members. Plaintiffs also allege Symetra obtained significant personal information about class members, including injury details and medical history, which it used to determine the cost of the SSA and to structure payments in a way to provide income and care for class members. They also allege Symetra occupied a position of superior knowledge and that class members justifiably placed their trust in Symetra to manage their payments. With respect to SABSCO, Plaintiffs allege fiduciary duty for essentially the same reasons, because SABSCO took on the legal obligation from the original defendant to make the lifetime payments.

The existence of a fiduciary duty is quintessentially an issue of fact. Construing the facts in favor of Plaintiffs, class members would have justifiably expected that their interests would be cared for by Symetra and SABSCO, as both entities had direct roles in administering ongoing funding and care under the terms of their underlying settlements.

e. Civil conspiracy.

Defendants argue the claim for civil conspiracy should be dismissed because Plaintiffs fail to allege unlawful conduct or unlawful means to accomplish lawful conduct. (Dkt. No. 31 at 29.) However, Plaintiffs have alleged such conduct. (Am. Compl. at ¶¶ 234–39.) They also alleged mail and wire fraud as predicate acts under RICO.

f. Unjust enrichment.

Defendants argue the claim for unjust enrichment should be dismissed because Plaintiffs received what they bargained for—the lump-sum payment—in exchange for their payment rights. (Dkt. No. 31 at 29.) But it is the validity of those contractual arrangements that is part of what is at issue here.

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II. Motion to Strike Class Allegations

Motions to strike class allegations are rarely granted. See In re Wal-Mart Stores, Inc. Wage & Hour Litig., 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007). And the Ninth Circuit has recognized that there are some cases where class certification cannot be determined without discovery. Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 942 (9th Cir. 2009). "The better and more advisable practice for a District Court to follow is to afford the litigants an opportunity to present evidence as to whether a class action was maintainable." Id. (internal quotation marks omitted).

Defendants argue the proposed class would be overwhelmed by individualized issues such as the reasons class members agreed to the transfers at issue, the state-court proceedings, applicable state law in multiple states, and the specific terms of underlying settlements and later transactions for lump-sum payments. However, the proposed class does not necessarily touch on these individualized issues. Plaintiffs' claims center on alleged violations that preceded state-court approvals. In particular, Plaintiffs allege Symetra had a duty to its annuitants that it violated by misusing confidential information and using its affiliate SABSCO to induce class members into selling their payment rights to offload its own payment obligations. At this stage,

the evidentiary record is insufficient to decide class certification on these issues. Therefore, the Court DENIES Defendants' motion to strike the class allegations.

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Defendants' motion to dismiss and strike class allegations is DENIED. The clerk is ordered to provide copies of this order to all counsel.

Dated August 5, 2021.

Marsha J. Pechman
United States Senior District Judge